(2)

FILED
FEB 9 2001
OFFICE OF THE CLERK

No. 00-788

IN THE

Supreme Court of the United States

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

AVIS RENT A CAR SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT T. WRIGHT, JR.
VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND
3100 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
(305) 371-8801

JONATHAN J. LERNER
Counsel of Record
ANGELA G. GARCIA
JACOB E. HOLLINGER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Attorneys for Respondent

38 pp

PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners are Zeirei Agudath Israel and Levi Sufrin. The defendant-respondent is Avis Rent A Car System, Inc.

The original named plaintiff in this action was David Rutstein. The district court disqualified Rutstein as class representative after he twice failed to appear for his court-ordered deposition, and after Avis produced evidence that his claim was entirely fraudulent.

STATEMENT PURSUANT TO RULE 29.6

Cendant Corporation owns more than 10 percent of Avis Rent A Car System, Inc. No other publicly held entity owns 10 percent or more of the company's stock, and there is no parent company.

TABLE OF CONTENTS

Page

Parties to the Proceedings i

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

STATEMENT OF THE CASE 1

I. District Court Proceedings Prior to Certification ... 1

A. The Original Plaintiff 1

B. Rutstein's Failure to Appear for Court-Ordered Depositions 2

C. Avis Opposes Rutstein's Class Certification Motion and Z.A.I. Moves to Intervene 3

D. Avis Moves for Summary Judgment 4

E. The *Sufrin* Action 4

F. The District Court's Omnibus Order 5

II. The Record Evidence 6

A. The Testimony of Avis's Employees 6

B. The Z.A.I. and Sufrin Complaints 7

Page

1. Z.A.I. 8

2. Sufrin 10

C. The Solicitation of Plaintiffs 11

D. The Testimony of Plaintiffs' Witnesses ... 12

III. The District Court's Class Certification Order 13

IV. The Eleventh Circuit's Decision Reversing Class Certification 16

REASONS FOR DENYING THE WRIT 17

I. The Decision Below Does Not Conflict with *Teamsters* 17

A. *Teamsters* Does Not Address Rule 23 18

B. *Teamsters* Did Not Involve a Claim for Money Damages 24

II. The *McDonnell Douglas* Model for a Prima Facie Case of Racial Discrimination Has No Bearing on the Issue of Class Certification 27

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Cases **Page**

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 21, 25, 27

Alvarado v. Carnation Co., 1995 U.S. Dist. LEXIS 10084 (D. Idaho June 23, 1995) 26

Anderson v. Cornejo, Nos. 97 C 7556, 99 C 3786, 2000 WL 286902 (N.D. Ill. March 10, 2000) 19, 21

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 25

Brooks v. Circuit City Stores, Inc., No. DKC 95-3296, 1996 WL 406684 (D. Md. June 17, 1996) 21-22

Brown v. American Honda Motor Co., Inc., 939 F.2d 946 (11th Cir. 1991) 28

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 18

Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir.), *cert. denied*, 121 S. Ct. 381 (2000) 26, 28

Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) 25

Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984) 29

Cases **Page**

General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 22

General Telegraph Co. v. Falcon, 457 U.S. 147 (1982) 24

Gorence v. Eagle Food Centers, Inc., No. 93 C 4862, 1994 WL 445149 (N.D. Ill. Aug. 16, 1994) 22, 25

Hillis v. Marsh, No. TX-79-82-CA, 1986 WL 10617 (E.D. Tex. Feb. 20, 1986) 22

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 1, 17, 18, 22

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 13-14, 20-21, 23

Jackson v. Motel 6 Multipurpose, Inc., 175 F.R.D. 337 (M.D. Fla. 1997) 19, 20

McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) 1, 17, 27

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 24

Cases **Page**

Ramirez v. Decoster, 194 F.R.D. 348 (D. Me. 2000) 21, 25

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000) 27

Secretary, United States Department Housing & Urban Development ex rel. Herron v. Blackwell, 908 F.2d 864 (11th Cir. 1990) 28

Stastny v. Southern Bell Telegraph & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 21

Stewart v. Adolph Co., 217 F.3d 1285 (10th Cir. 2000), *cert. denied*, 121 S.Ct. 774 (2001) 29

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) 26

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 23, 29

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 19

United Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 29

Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566 (11th Cir. 1992) 21

Rules and Statutes **Page**

Fed. R. Civ. P. 23 3

Fed. R. Civ. P. 23(a) 14

Fed. R. Civ. P. 23(b)(3) ..... *passim*

Fed. R. Civ. P. 23(f) 16

Fed. R. Civ. P. 37 3

Fed. R. Civ. P. 41(b) 4

28 U.S.C. § 1404(a) 6

42 U.S.C. § 1981 ..... *passim*

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e-6(a) 18

Respondent Avis Rent A Car System, Inc. ("Avis") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by plaintiffs Zeirei Agudath Israel ("Z.A.I.") and Levi Sufrin. As set forth below, the petition should be denied because the decision of the Court of Appeals for the Eleventh Circuit does not conflict with this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), or *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), does not create a split among the Courts of Appeals, and does not raise any issues of great national importance, but rather involves the routine application of Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

I. District Court Proceedings Prior to Certification

A. The Original Plaintiff

This action was originally filed in the United States District Court for the Southern District of Florida as an individual action by David Rutstein pursuant to 42 U.S.C. § 1981. (R I-1)[1] Rutstein subsequently amended his complaint to assert class claims on behalf of more than 10,000 "Jewish-owned businesses and Jewish individuals." (R I-2 ¶¶ 3, 6)

In the amended complaint, Rutstein claimed to own a "Rutstein Insurance Agency" and that in early 1993, he called Avis's telesales department in Tulsa, Oklahoma to apply for an

---

[1] Citations to "R" and "Supp. R" refer to the volume number of the original record, the document number within each volume, and, where applicable, either the exhibit or tab number and/or the page number within the document.

Avis corporate account.[2] (R I-2 ¶ 18) According to Rutstein, his application was denied because Avis's telesales department allegedly had a "yeshiva" policy pursuant to which callers who had a "Jewish-sounding" name were denied corporate accounts. (*Id.* ¶¶ 3, 8) Rutstein sought to represent a class consisting of all Jewish individuals and businesses "who were rejected the right to do business with AVIS due to their race, ancestry and ethnic characteristics." (*Id.* ¶ 19)[3]

Rutstein moved for class certification on August 4, 1997. The district court subsequently entered a scheduling order for discovery on class certification issues and briefing on the motion.

B. Rutstein's Failure to Appear for Court-Ordered Depositions

After taking several depositions of Avis's employees, Rutstein failed to appear for his own court-ordered deposition.

---

[2] The benefits of an Avis corporate account include discounted rental rates, free rentals, and a cap on exposure to damages. (Supp. R II-102 Tab 2 at 55) The basic requirements to qualify for the account are that the business be legitimate and have a need to rent cars for business purposes at least 12 to 18 times a year. (*Id.* Tab 2 at 19-20 & Tab 5 at 18)

[3] Avis categorically denies that it discriminated against Jewish-owned businesses. The Anti-Defamation League of B'nai B'rith stated publicly that it believes Avis does not have a policy of prejudice against Orthodox Jews. (*See* James T. Madore, *ADL Backs Avis in Bias Charge: Group sees no proof of prejudice in policies*, Newsday, March 7, 1997, Supp. R IX-194 Ex. A)

(R III-92 Ex. O) Avis moved for sanctions, including dismissal of the action, pursuant to Fed. R. Civ. P. 37. In opposing the motion, plaintiffs' counsel did not defend their client's non-appearance at his deposition. Instead, they urged the district court not to dismiss the action so as to allow intervention by additional (yet to be identified) plaintiffs. (R IV-101)

The district court awarded Avis costs and attorneys' fees, and again ordered Rutstein to appear for his deposition. (R V-126) Again, however, Rutstein refused. Accordingly, Avis renewed its Rule 37 motion to dismiss. (R V-130)

C. Avis Opposes Rutstein's Class Certification Motion and Z.A.I. Moves to Intervene

In opposition to Rutstein's class certification motion, Avis challenged Rutstein's adequacy to serve as class representative based on his refusal to appear for two court-ordered depositions, and submitted evidence showing that Rutstein had a criminal record and that he never owned or operated a "Rutstein Insurance Agency" which he claimed Avis discriminated against. (Supp. R II-103 Exs. A, B, N, O & Q) Avis further opposed class certification based on Rutstein's failure to satisfy any of the requirements of Fed. R. Civ. P. 23.

In their reply, plaintiffs' counsel did not dispute any of Avis's evidence demonstrating that Rutstein's complaint was a complete sham. Instead, they stated that a motion to intervene would be filed (by still unidentified intervenors) to remedy Rutstein's inadequacies.

On December 5, 1997 -- more than eight months after Rutstein filed his sham complaint and five weeks after the close of class certification discovery -- Z.A.I. filed its motion for intervention. (R IV-111) Avis opposed the motion based on

the well-established principle that, where the original plaintiff lacked standing, there is no justiciable case into which a third party can intervene. (R V-121 at 8-10) Avis also opposed the motion on grounds that it was untimely under the court's scheduling order. (*Id.* at 11-15)

D. Avis Moves for Summary Judgment

Based on the same evidence showing that Rutstein never had a claim against Avis, Avis also moved for summary judgment for lack of standing. (R IV-119, 120) In the alternative, Avis sought dismissal for failure to prosecute under Fed. R. Civ. P. 41(b) and the Court's inherent power based on Rutstein's abandonment of the case. (*Id.*)

In their opposition to Avis's summary judgment motion, plaintiffs' counsel again did not dispute any of the evidence showing that Rutstein's claim against Avis was a fraud. Instead, they argued that the district court should allow for the substitution of Z.A.I. as named plaintiff rather than dismiss the action. (Supp. R IV-133 at 7-8)

At a subsequent omnibus hearing on all pending motions, plaintiffs' counsel conceded that Rutstein was not an adequate class representative and that he had "effectively withdrawn his appearance in this case." (Pet. App. at 8a; R VIII-150 at 4, 9)

E. The *Sufrin* Action

On February 24, 1998, more than three weeks after the omnibus hearing, Sufrin filed a separate action pursuant to 42 U.S.C. § 1981 on his own behalf and as a representative of a putative class. (Supp. R X-1) He alleged that Avis had cancelled his corporate account, which he purportedly held as

an employee of the Chabad of Margate, because he is Jewish. (*Id.* ¶¶ 21, 22) According to his complaint, Sufrin lived in Florida, but the events underlying his complaint allegedly took place in Oklahoma and New York. (*Id.* ¶¶ 4, 14-27)

On March 18, 1998, shortly after Avis answered Sufrin's complaint (Supp. R X-9), Sufrin moved to consolidate his case with the *Rutstein* action. (R VI-159) On March 23, 1998, well before the time expired for Avis to file its opposition to Sufrin's consolidation motion, the district court summarily granted that motion. (R VII-225) Avis filed a motion for reconsideration (Supp. R X-11), which the district court also summarily denied. (Supp. R X-15)

F. The District Court's Omnibus Order

On March 25, 1998, the district court issued an Omnibus Order. Among other things, the district court permitted Z.A.I. to intervene in the *Rutstein* case and granted leave for the filing of the intervenor's complaint, which it acknowledged "substitutes [Z.A.I.] for Rutstein and revises the composition of the proposed class." (R VI-162 at 4) The district court found Z.A.I.'s motion for intervention to be timely by bootstrapping it to the order it issued just two days earlier granting Sufrin's motion to consolidate his action with the *Rutstein* action, stating: "Under the circumstances, intervention will neither complicate the case nor cause undue delay as discovery in the two cases can proceed concurrently." (*Id.* at 3)

Finding that Avis had presented "substantial and convincing evidence showing that David Rutstein is not an adequate class representative," the district court denied class certification on that ground (without reaching the other grounds advanced by Avis). (*Id.* at 5) The denial of class certification, however, was without prejudice to refiling it after additional

discovery had been conducted concerning the typicality and adequacy of Z.A.I. to serve as class representative. (*Id.*)

Finally, the district court denied Avis's motion for summary judgment for lack of standing, holding that "material issues of fact exist regarding Rutstein's business ownership and alleged injury" even though plaintiffs' counsel never disputed the evidence submitted by Avis on the issue. (*Id.* at 6) In addition, despite acknowledging that Rutstein had failed to abide by court orders directing discovery and had failed to prosecute the case, the district court denied Avis's renewed motions to dismiss under Rules 37 and 41(b) because it had granted intervention by Z.A.I. who "may step into Rutstein's shoes for purposes of prosecuting this lawsuit." (*Id.*)[4]

In a subsequent Order, dated May 5, 1998, the district court granted a motion filed by Sufrin to intervene in this action. (R VI-167)

II. The Record Evidence

A. The Testimony of Avis's Employees

Plaintiffs' counsel took the depositions of five Avis employees in Tulsa, all of whom testified unequivocally that Avis's telesales representatives were never instructed to treat

---

[4] Avis had also moved pursuant to 28 U.S.C. § 1404(a) to transfer both the *Rutstein* action and the *Sufrin* action to the Northern District of Oklahoma, where all the operative events underlying their claims occurred, where most of the witnesses reside, and where most of Avis's records relevant to this action are located. (R II-56; Supp. R X-8) As part of the Omnibus Order, the district court summarily denied these motions. (R VI-162 at 2-3)

any business differently because it was Jewish-owned or had a Jewish-sounding name. The Avis employees acknowledged that the term "yeshiva" was used in Avis's telesales department, but they made it clear that the term referred to underage individuals -- regardless of race or religion -- who sought to circumvent the age 25 restriction for renting cars by setting up illegitimate corporate accounts.[5] According to Avis's employees, the term "yeshiva" was used in Avis's telesales department to refer to underage callers because when the problem first surfaced in the late 1980's and early 1990's, the callers would identify themselves over the telephone as being affiliated with yeshiva institutions. (Supp. R IX-194 Ex. L)

B. The Z.A.I. and Sufrin Complaints

Z.A.I. and Sufrin's complaints sought to change the nature of Rutstein's original claim and to expand the putative class to include:

> All Jewish individuals and Jewish-owned businesses who, subsequent to January 1, 1990, have attempted to contract, have contracted, or will in the future contract with AVIS to open an account for use in their business, and *who were refused an account, had their account canceled, or were given a less advantageous account*

---

[5] With certain narrow exceptions and as permitted by state law, Avis has always had a policy that required renters to be at least 25 years of age. One exception applies to companies with a corporate account if it includes a waiver of the minimum age requirement. (Supp. R IX-194 Ex. E ¶ 4)

> because of their religion, ancestry, and/or ethnicity.[6]

(R V-154 ¶ 7) (Emphasis added.)

Despite this expanded class definition, Z.A.I. and Sufrin have identified no Jewish individuals or businesses, other than themselves, that claim to have been discriminated against by Avis's telesales department. Moreover, the record shows that the two plaintiffs are each asserting a claim presenting unique factual circumstances.

1. Z.A.I.

Z.A.I. is a bookstore located in the premises of Teleshe Yeshiva, an Orthodox Jewish school in Chicago, and is represented in this action by Joshua Borenstein, a student at Teleshe Yeshiva who purportedly manages the bookstore on a part-time basis. (Supp. R IX-194 Ex. I at 4, 11-12) Borenstein was 23 years old at the time relevant to this action. (*Id.* Ex. G)

Z.A.I.'s complaint alleges that in early 1995, Borenstein applied for an Avis corporate account in the name of "Zeirei Agudath Israel," but was allegedly turned down "because of its obviously Jewish sounding name." (R V-154 ¶ 21) According to the complaint, Borenstein applied again for an Avis corporate account in January 1996 using the name Z.A.I. Bookstore. The application was accepted allegedly because Avis's telesales representatives "did not recognize Z.A.I. as a Jewish sounding name." (*Id.* ¶ 22) The complaint alleges that in May 1996,

---

[6] Z.A.I. and Sufrin added a claim for religious discrimination which was not present in Rutstein's complaint. On its face, 42 U.S.C. § 1981 does not cover religious discrimination.

Borenstein received a "perplexing" letter from Avis canceling Z.A.I.'s corporate account. (*Id.* ¶ 24)

On its face, the "perplexing" letter from Avis referred to in Z.A.I.'s complaint makes it clear that Avis had valid nondiscriminatory reasons for canceling Z.A.I.'s corporate account. The letter advised Borenstein that Z.A.I.'s corporate account was being cancelled because it had too little rental activity and that too much of the rental activity appeared to be from renters under the age of 25. Significantly, the letter closed by stating: "If you find that your company's rental needs increase significantly and you have a preponderance of renters over the age of 25, please do not hesitate to consider Avis as your car rental supplier." (Supp. R IX-194 Ex. F)

At his deposition, Borenstein admitted that at the times relevant to this lawsuit, Z.A.I.'s only employees were himself and two part-time student volunteers, both of whom were between the ages of 18 to 20. (*Id.* Ex. I at 12-13, 41-42) When asked what the basis was for his belief that he was discriminated against by Avis, Borenstein testified, "I'm referring to Yeshiva world rumors where it was taken on as a simple fact of life that these that [sic] problems did arise. . . And then when something happened to me, the logical assumption and feeling is going to be that this is the reason." (*Id.* at 212)

Significantly, Borenstein acknowledged that the problems he referred to were experienced by yeshiva students under the age of 25 attempting to rent Avis cars, and not Jewish-owned businesses in general (*id.* at 201), stating: "It was a suspicion that as soon as the word "Yeshiva" was in there or as soon as something regarding the Yeshiva they [Avis] would catch on that *it was students then it was time to look for the next corporate account.*" (*Id.* at 203) (Emphasis added.)

2. Sufrin

Sufrin's complaint states that he held an Avis corporate account as an employee of the Chabad of Margate and that in March 1996, he attempted to rent a car at an Avis counter in Newark Airport using his Avis corporate account. (Supp. R X-1 ¶¶ 5, 22) Sufrin alleges that he was refused a rental car when he could not produce a company identification. One week later, he allegedly received a "perplexing letter from AVIS advising that his account at AVIS had been terminated and his privileges revoked." (*Id.* ¶ 22) Sufrin, however, has produced no evidence showing that he ever held an Avis corporate account, and Avis has no record of such an account.

Sufrin, who was a 21-year-old student at the time relevant to his complaint, testified at his deposition that he was able to rent cars from Avis on numerous occasions beginning at the age of 18 by using a corporate account. (Supp. R IX-194 Ex. B at 80-83, 90-97) The record shows, however, that in April 1996, Sufrin was placed by Avis in its Name Risk File, thereby terminating his *individual* rental privileges, after it was determined that a corporate account being used by Sufrin belonged to U.S. Life, a company with which he had no affiliation.[7] (*Id.* Ex. D) At his deposition, Sufrin conceded that the "puzzling letter" referred to in his complaint was a notification from Avis that he would no longer be allowed to rent cars from Avis. (*Id.* Ex. B at 124-26)

---

[7] Seth Kaminsky, the head of Avis's security department, submitted an affidavit to the district court stating that the Risk File, or "Do Not Rent" list, identifies *individuals* who are not permitted to rent cars from Avis because of a violation of the rental agreement, including unauthorized rental under the age of 25. (Supp. R IX-194 Ex. E ¶¶ 3-4)

At his deposition, Sufrin made it clear that his claim that he was discriminated against by Avis is premised only on the termination of his individual rental privileges as a result of the Newark Airport incident -- and not, as alleged in his complaint, on the cancellation of a corporate account by Avis's telesales department in Tulsa. (*Id.* at 112-17) When asked at his deposition what his basis was for alleging that Avis has a policy of discrimination, he stated: "Well, I knew that in *certain locations* that when you go to rent cars there was a good chance they would cut you off. . . . The cut off is that if I went to rent a car in certain places which were highly populated with Jewish people, that *they would find a reason to revoke your renting privileges.*" (*Id.* at 155) (Emphasis added.) According to Sufrin, he believes he was discriminated against at the Avis rental counter in Newark Airport not because he is Jewish, but because he is an Orthodox Jew. (*Id.* at 205-07)

C. The Solicitation of Plaintiffs

Plaintiffs' allegations against Avis have been widely publicized throughout the country (Supp. R IX-194 Ex. X), and their counsel have placed advertisements in publications both in Florida and in Israel soliciting potential class members. (*Id.* Ex. Y) Moreover, immediately after filing the original complaint in this action, plaintiffs' counsel appeared before the New York State Assembly to testify about the unproven allegations in the complaint. (*Id.* Ex. V at 33, 37) Despite this calculated publicity, no class members other than the discredited Rutstein and the two plaintiffs have appeared.

Even Sufrin and Z.A.I. did not come forward on their own. Their names appeared in documents produced by Avis to Rutstein, the original phantom plaintiff, in an action that was improper from its inception. Exploiting this ill-gotten discovery, the record shows that plaintiffs' counsel contacted both by

telephone to solicit them to become named plaintiffs. (*Id.* Ex. B at 204-05; Ex. I at 99-100, 105-08, 110-112)

D. The Testimony of Plaintiffs' Witnesses

In support of their claim that Avis has a policy of discriminating against Jewish-owned businesses, plaintiffs' counsel produced the transcript of a "sworn examination" of William Ward (Supp. R IX-194 Ex. N), a former Avis employee who worked in the telesales department for 17 months and was terminated for dishonesty. (*Id.* Ex. O at 28, 150-51)

The record shows that Ward's use of the term "yeshiva" did not just refer to Jewish businesses. Ward admitted at his deposition that any applicant for a corporate account -- whether the name was Jewish-sounding or not -- would be classified as a "yeshiva" if it was not listed with directory assistance or Dun & Bradstreet and that "yeshiva just became a slang term used for somebody who was going to damage Avis cars or even possibly defraud Avis." (*Id.* Ex. O at 95-96, 53) Notably, Ward alleged no discrimination by Avis concerning the *cancellation* of corporate accounts or the revocation of individual rental privileges.

In addition to Ward's testimony, the district court also relied on an *ex parte* sworn statement from Elaine Rodgers, another former Avis employee. Rodgers, however, testified that the alleged "yeshiva" policy related only to *existing* corporate account holders exclusively from the New York area who were seeking to lower Avis's minimum age requirement for renting cars:

> Q: From a customer service standpoint, if it was determined that the customer was a

Yeshiva, was there any financial restriction placed on the account?

A: No, not that I'm – that I was aware of. *They were just denied the minimum age benefit.*

. . . .

Q: Do you have any knowledge if this practice was enforced in other parts of the country where there are large Jewish populations?

A: Not to my knowledge. It was mainly – well, *all of it was in the New York area, if they were from New York.*

. . . .

Q: Once an account representative believed that a person was a Yeshiva, how was this policy of discrimination enforced by the company?

. . . .

A: Okay. *They would not get the minimum age reduction.*

(Supp. R IX-194 Ex. V at 7-12) (Emphasis added.)

III. The District Court's Class Certification Order

Plaintiffs filed a renewed motion for class certification in July 1998. (Supp. R VIII-182, 183, 184) Avis opposed this motion primarily on the ground that, under the controlling authority of *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d

999 (11th Cir. 1997), the individualized inquiry required to resolve each class member's claim of disparate treatment precluded certification of the class. Avis also opposed the motion on other, equally compelling, grounds, including: (i) neither Sufrin nor Z.A.I. was an adequate class representative because both were subject to unique defenses, (ii) the absence of any evidence of an aggrieved class precluded a finding of numerosity, commonality and typicality required under Fed. R. Civ. P. 23(a), and (iii) certification under Rule 23(b)(2) was inappropriate because the primary form of relief sought was money damages.

Following a hearing, the district court granted class certification. (Pet. App. B) In its order, the district court acknowledged that both Sufrin and Z.A.I. are subject to unique defenses. *(Id.* at 49a-51a) Nonetheless, and in plain derogation of well-established precedent, the district court determined that Z.A.I. and Sufrin were adequate class representatives, stating the existence of the unique defenses was not an appropriate area of inquiry on a class certification motion. *(Id.)*

The district court also acknowledged that notwithstanding their claims to represent a class of thousands, the two named plaintiffs had failed to identify even one other person who claimed to have been victimized by Avis's alleged policy of discrimination. (Pet. at 42a) Nonetheless, the district court made a conditional finding that plaintiffs had satisfied Rule 23(a)'s numerosity requirement. *(Id.)* The district court also found that plaintiffs satisfied the commonality and typicality requirements of Rule 23(a) based on their allegation that Avis had a policy of discrimination.

Turning to the requirements of Rule 23(b), the district court correctly held that certification under Rule 23(b)(2) was not appropriate because plaintiffs' claims for compensatory and

punitive damages predominated over their claim for injunctive relief. (Pet. at 52a-57a) Plaintiffs did not challenge this ruling before the Eleventh Circuit and have not raised it in their petition.

The district court did, however, grant certification pursuant to Rule 23(b)(3). In doing so, the district court recognized that in *Jackson*, the Eleventh Circuit held that Rule 23(b)(3)'s predominance requirement was not satisfied where the only issue common to the putative class was whether the defendant had a general policy of discrimination. Nonetheless, the district court held that *Jackson* was "narrowly limited to the facts involved in that case," and that plaintiffs here had produced greater evidence of a nationwide policy of discrimination than had the *Jackson* plaintiffs. (Pet. at 68a)

Although the district court distinguished *Jackson*, it recognized that class certification would create numerous difficulties in terms of managing the litigation. Thus, without the benefit of briefing or oral argument, the district court *sua sponte* declared: "This court will bifurcate the liability aspects of the trial; first determining liability issues common to the class, that is, whether a policy and practice of illegal discrimination exists. Only if a policy and practice of discrimination is found will the court determine discrete liability issues." (Pet. at 67a n.12)

Significantly, the district court concluded its order by explaining that its interpretation of *Jackson* "could well be incorrect," and opining that an interlocutory appeal was therefore appropriate. (Pet. at 68a-69a) In the same breath, the district court stated that in the event its Rule 23(b)(3) ruling was reversed on appeal, it would order certification under Rule 23(b)(2) "without the claims for money damages." (Pet. at 68a n. 13) The district court recrafted the complaint for purposes of

Rule 23(b)(2) despite the fact that plaintiffs had never expressed any intention to abandon their claims for money damages.

IV. The Eleventh Circuit's Decision Reversing Class Certification

The Court of Appeals for the Eleventh Circuit granted Avis leave to appeal pursuant to Fed. R. Civ. P. 23(f).

In a thorough and well-reasoned decision, the Court of Appeals reversed the district court's grant of class certification. Relying on *Jackson* as binding precedent, the Court of Appeals held that plaintiffs' could not satisfy Rule 23(b)(3) because the single common issue of whether Avis had a policy of discrimination could not predominate over the myriad individualized issues presented by plaintiffs' disparate treatment claims. (*Id.* at 15a-19a)

The Court of Appeals rejected *amici's* argument that *Teamsters* compelled a finding that the issue of whether Avis had a policy of discrimination predominated over individualized issues. It gave two reasons: (i) the *Teamsters* rationale is particularly appropriate in employment discrimination cases, and (ii) the relief to which the plaintiffs in *Teamsters* were entitled after a finding of a pattern or practice of discrimination was equitable in nature. (Pet. at 26a) The Court of Appeals concluded: "The Teamsters framework is, therefore, inappropriate *in the instant* case because the establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the plaintiffs in the putative class. (Pet. at 27a) (Emphasis added.)

REASONS FOR DENYING THE WRIT

Like medieval alchemists struggling to turn lead into gold, petitioners attempt in vain to turn the opinion below into something it is not: a case about the burden-shifting approaches of *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In reality, the Eleventh Circuit's decision did not turn on the applicability of *Teamsters* or *McDonnell Douglas* to this case. Rather, the sole issue resolved below was whether a class could properly be certified under Rule 23(b)(3) where the class members are asserting claims for disparate treatment discrimination and seeking money damages. Based on well-established authority, the Eleventh Circuit merely held that the individualized inquiry that will be required to resolve each plaintiff's claims necessarily predominates over the one issue arguably common to the class -- whether Avis had a policy of discrimination.

Against this backdrop, it becomes crystal clear that the decision below does not present an issue of public importance or create a split with other circuits. Instead, it merely involves a routine application of the requirements of Rule 23. As such, it is singularly inappropriate for certiorari review, and plaintiffs' petition should be denied.

I. The Decision Below Does Not Conflict with *Teamsters*

Under Rule 23(b)(3), a class can be certified only where (i) questions of law or fact common to the class members predominate over any individual issues and (ii) the class action is superior to other methods for the fair and efficient adjudication of the litigation. Fed. R. Civ. P. 23(b)(3). In determining whether common issues predominate over individual issues,

courts must consider the claims, defenses, relevant facts, and substantive law presented in the case. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

In their petition, plaintiffs argue that the court below erred in decertifying the class under Rule 23(b)(3) because, under this Court's decision in *Teamsters*, the question of whether Avis had a policy of discrimination "was an overriding common question and, if answered affirmatively, established a prima facie case of unlawful discrimination applicable to every class member." (Pet. at 15, 21) This argument must be rejected for two reasons: (i) *Teamsters* does not address the requirements of Rule 23; and (ii) *Teamsters* does not involve claims for money damages.

A. *Teamsters* Does Not Address Rule 23

Teamsters was an action for equitable relief brought by the government pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). 431 U.S. at 328. This Court merely held in *Teamsters* that proof of a pattern or practice of discrimination supports the inference that any particular employment decision, during the period in which the policy was in force, was made in pursuit of that policy, and the burden then shifts to the employer to demonstrate that the individual applicant was denied employment for lawful reasons. 431 U.S. at 362.

Nothing in *Teamsters* addresses class certification under Rule 23, much less the predominance requirement of Rule 23(b)(3). Indeed, plaintiffs fail to cite a single case which has relied on the burden-shifting framework of *Teamsters* as a basis for holding that the predominance of common issues required by Rule 23(b)(3) has been satisfied.

To be sure, the Eleventh Circuit stated in *dicta* that "the Teamsters rationale is particularly appropriate in employment discrimination cases." (Pet. at 22a) Its decision to decertify the class, however, was *not* based on a distinction between employment and non-employment cases. Rather, decertification was mandated by the Eleventh Circuit's prior decision in *Jackson*.[8]

In *Jackson*, the complaint was filed under 42 U.S.C. § 1981, alleging that a motel chain had a nationwide policy of discrimination against customers on the basis of race. The district court there certified a class under Rule 23(b)(3) on the ground that "litigating the existence or non-existence of a nationwide policy of racial discrimination certainly does not call for class member-specific proof." *Jackson v. Motel 6 Multipurpose, Inc.*, 175 F.R.D. 337, 345 (M.D. Fla. 1997). The Eleventh Circuit granted a writ of mandamus and held that the district court had abused its discretion in certifying the class.

---

[8] It is noteworthy that plaintiffs do not cite a single case applying *Teamsters* to non-employment discrimination cases. *Cf. Anderson v. Cornejo*, Nos. 97 C 7556, 99 C 3786, 2000 WL 286902, at *6 (N.D. Ill. March 10, 2000) (noting that plaintiffs there "do not point to any cases in which the pattern or practice method of proof has been applied outside the context of employment discrimination actions"). As discussed below, however, whether *Teamsters* is limited to the employment context would not affect application of the requirements under Rule 23(b)(3). Accordingly, this is not an issue that warrants review by this Court at this time. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959) (dismissing writ of certiorari where issue that lead to grant of certiorari "can await a day when the issue is posed less abstractly").

Jackson, 130 F.3d at 1006-07.[9] In directing the district court to decertify the class, the Eleventh Circuit squarely held that the allegation that the defendant has a nationwide policy of discrimination is not sufficient to make common issues predominate over individualized issues in an action involving disparate treatment discrimination claims:

> The *Jackson* plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination. . . . Even more variegated issues would certainly be present in the claims of hundreds or even thousands of members of an improperly certified class. Furthermore, even factual issues that are common to many of the *Jackson* plaintiffs . . . will require highly case-specific determinations at trial. These issues are clearly predominant over the only issue arguably common to the class -- whether [defendant] has a

---

[9] The evidence of the alleged discriminatory policy in *Jackson* included: (i) seven former and current employees of the defendant, including a former manager, submitted affidavits attesting to the defendant's discriminatory policy; (ii) five of the former employees had filed their own class action claiming that they were forced to discriminate against the plaintiff class; and (iii) 15 class members submitted affidavits attesting to being victims of the alleged discriminatory policy. 175 F.R.D. at 342; 130 F.3d at 1002. Based on this evidence, the district court in *Jackson* determined that there was an "adequate factual basis" for the plaintiffs' allegation that the defendant had policy of discrimination, 175 F.R.D. at 343, and the Eleventh Circuit described the allegations as "serious," 130 F.3d at 1002-03 n.5.

> practice or policy of racial discrimination. Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether [defendant] has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues."

130 F.3d at 1006.

Jackson has been followed by the Court of Appeals for the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which was an employment discrimination case brought under Title VII and 42 U.S.C. § 1981. Significantly, in *Allison*, the Fifth Circuit expressly noted that the burden of proof would shift to the employer once the plaintiffs demonstrated a pattern or practice of discrimination, but nonetheless held that certification would still be improper under Rule 23(b)(3). 151 F.3d at 421. *See also Ramirez v. Decoster*, 194 F.R.D. 348, 354 (D. Me. 2000) (rejecting argument that *Teamsters* approach would permit predominance requirement of Rule 23(b)(3) to be satisfied); *Anderson*, 2000 WL 286902, at *6-*7 (even if pattern or practice of unconstitutional conduct were proven, Rule 23(b)(3) certification is improper because liability for individual class members would still need to be resolved).[10]

---

[10] Numerous courts have long recognized that disparate treatment discrimination claims are generally less amenable to class certification. *See, e.g., Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 n.10 (11th Cir. 1992); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980); *Brooks v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1996 WL 406684, at *5

(continued...)

Certainly, nothing in *Teamsters* dispenses with the individualized inquiry required in a disparate treatment case. Indeed, in remanding the case to the district court for further proceedings on individual rights to relief, this Court stated:

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices.

431 U.S. at 371-72.

Here, plaintiffs' claim under 42 U.S.C. § 1981 -- the same statute at issue in *Jackson* and *Allison* -- requires proof of intentional discrimination and therefore can proceed only under the theory of disparate treatment. *See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 & n.17 (1982). Accordingly, even if plaintiffs were to demonstrate that Avis had a policy of discrimination and thereby benefit from the *Teamsters* presumption, they still would have the burden of proving that Avis's proffered reason for each challenged conduct was a pretext for discrimination. As stated by the Eleventh Circuit:

> The individual issues that must be addressed include not only whether Avis actually denied a particular plaintiff a corporate account, gave the

---

[10] (...continued)
(D. Md. June 17, 1996); *Gorence v. Eagle Food Centers, Inc.*, No. 93 C 4862, 1994 WL 445149, at *9-*11 (N.D. Ill. Aug. 16, 1994); *Hillis v. Marsh*, No. TX-79-82-CA, 1986 WL 10617, at *27 (E.D. Tex. Feb. 20, 1986).

> plaintiff a less advantageous account, or cancelled the plaintiff's account, but also whether the particular plaintiff was of the age required by Avis to qualify for a corporate account, whether the plaintiff met the financial criteria for a corporate account; whether the nature of the plaintiff's expected use of Avis vehicles would make the transaction cost-justified for Avis; whether the plaintiff would be renting cars from Avis in a criminally high-risk or low-risk geographical area; whether the Avis employee who allegedly denied the plaintiff a corporate account judged the caller-applicant to be lying about his or her qualifications based on information not related to the caller's ethnicity; and so on, and so on.

(Pet. at 17a; *see also* Pet. at 18a n.15; 26a-29a)

Regardless of whether the *Teamsters* presumption applies, these individual-specific issues will need to be addressed by the trier of fact to determine Avis's ultimate liability to each individual class member. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). In fact, if plaintiffs are correct that *Teamsters* applies and class members will benefit from class-wide proof of discrimination, it will necessarily be the individualized issues that will be the focus of inquiry in determining individual relief. *See Jackson*, 130 F.2d at 1006 n.13 (because issue common to class will be "very readily satisfied . . . the cases may be expected to focus on the highly case-specific factual inquiries that will establish or controvert" claim that each plaintiff was discriminated against on basis of race).

Significantly, although the Eleventh Circuit's decision to decertify the class in this case was mandated by its prior decision in *Jackson*, plaintiffs do not argue that *Jackson* was decided incorrectly, much less cite a single case which is inconsistent with *Jackson*. Moreover, although plaintiffs discuss the district court's attempt to distinguish *Jackson* from this case (Pet. at 5), they have abandoned their argument that *Jackson* is distinguishable from this case. Indeed, there is a glaring absence of any mention of *Jackson*, or even *Allison*, in the argument section of plaintiffs' petition.

In the final analysis, plaintiffs are attempting to circumvent *Jackson* and *Allison* by seizing on the burden-shifting framework of *Teamsters* as support for their proposition that an allegation of a policy of discrimination alone is sufficient to warrant class certification. That is simply not the law. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) ("allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified").

Under the circumstances, there is no conflict between the decision below and *Teamsters* that warrants review by this Court.

B. *Teamsters* Did Not Involve a Claim for Money Damages

A "more important" reason the Eleventh Circuit gave for distinguishing *Teamsters* was that the relief sought in that case was equitable in nature, whereas plaintiffs here are primarily seeking compensatory and punitive damages. (Pet. at 26a-29a) *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring) (noting that while injunctive relief may be appropriate once class has established that

discrimination was employer's standard practice, "as to the individual members of the class, the liability phase of the litigation is not complete"); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984) ("While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class."). This distinction, standing alone, precludes the finding of a conflict between *Teamsters* and the decision below.

Plaintiffs do not, and cannot, argue that their claims for compensatory damages will require individualized inquiry. Instead, they focus on their claims for punitive damages, contending that they "can easily be determined and awarded on a class wide basis." (Pet. at 26) This contention is meritless. It is well-settled that the amount of punitive damages awarded in a civil rights case must be "reasonably related" to the reprehensibility of the defendant's conduct and to the compensatory damages awarded. *Allison*, 151 F.3d at 417. *Cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-81 (1996). Accordingly, as with compensatory damages, claims for punitive damages must necessarily "focus almost entirely on facts and issues specific to individuals rather than the class as a whole," thereby detracting from the superiority of the class action device for resolving claims. *See Allison*, 151 F.3d at 419. *See also Ramirez*, 194 F.R.D. at 354 (even if *Teamsters* framework enabled common issues to predominate, class action still would not be superior for adjudicating claims because same jury from liability stage would need to make individualized determinations to establish compensatory and punitive damages); *Gorence v. Eagle Food Ctrs., Inc.*, No. 93 C 4862, 1994 WL 445149, at *11 (N.D. Ill. Aug. 16, 1994) (holding that class action would neither be efficient nor economical because court "would be forced to hold a series of mini-trials to determine

whether each class member suffered discrimination, as well as individualized damages").[11]

Equally unavailing is plaintiffs' contention that the Eleventh Circuit ignored their request for equitable relief. (Pet. at 24) If anything, this argument is relevant only to certification under Rule 23(b)(2), which allows for certification if the relief sought is primarily injunctive or declaratory. The propriety of Rule 23(b)(2) certification in this case, however, is not one of the issues raised by plaintiffs in their petition.

In any event, as the district court concluded, the equitable relief plaintiffs sought was subsidiary to their request for money damages. (Pet. at 52a-57a) Plaintiffs did not, and could not, challenge that conclusion before the Eleventh Circuit, and thus their effort to challenge it now is not properly

---

[11] Plaintiffs cite one district court case from Idaho for the proposition that the issue of punitive damages is common to the class for the purposes of meeting the predominance requirement of Rule 23(b)(3). (Pet. at 26) *See Alvarado v. Carnation Co.*, 1995 U.S. Dist. LEXIS 10084 (D. Idaho June 23, 1995). *Alvarado*, however, contained no analysis on the punitive damage issue, and we submit that its conclusion is against the weight of authority. *Id.* at *20. The remaining punitive damage cases relied on by plaintiffs either are not class actions at all or did not address the issue of class certification. (Pet. at 26) Moreover, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), has been called into question in the Eleventh Circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.) (holding that because *Tapscott's* discussion of punitive damages cannot be reconciled with prior precedent in Eleventh Circuit, *Tapscott* could not be followed), *cert. denied*, 121 S. Ct. 381 (2000).

preserved. *See also Allison*, 151 F.3d at 418 ("Given the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages in this case.").

II. The *McDonnell Douglas* Model for a Prima Facie Case of Racial Discrimination Has No Bearing on the Issue of Class Certification

In an attempt to manufacture a circuit split where none exists, plaintiffs cite six cases -- none of which is a class action -- for the proposition that *McDonnell Douglas* is applicable to non-employment discrimination cases. (Pet. at *i*, 15-20) Nothing in the Eleventh Circuit's decision, however, holds otherwise.

McDonnell Douglas was *not* a class action. Nor did it even refer to the requirements for class certification. In *McDonnell Douglas*, this Court merely held that an individual plaintiff could establish a prima facie case of racial discrimination, under the particular facts of that case, by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after the rejection, the position remained open and the employer continued to seek applicants. 411 U.S. at 802.[12]

---

[12] Significantly, this Court noted in *McDonnell Douglas* that the elements of a prima facie showing of employment discrimination set forth in that case "is not necessarily applicable in every respect to differing factual situations." *Id.* at 802. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2105 (2000) (noting that Court had not squarely addressed whether *McDonnell Douglas* applies to

(continued...)

Once the plaintiff establishes a prima facie case, the *McDonnell Douglas* method of proof shifts the burden to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.*

Nowhere in its opinion did the court below hold that *McDonnell Douglas* could never be applicable to non-employment discrimination cases.[13] Instead, in explaining why a showing of a discriminatory policy by Avis would not establish liability as to individual members of the putative class, the court merely stated that the plaintiffs here will have to show an intent to discriminate by Avis as part of their prima facie case. (Pet.

---

[12] (...continued)
age discrimination actions).

[13] Consistent with the six cases cited by plaintiffs, the Eleventh Circuit has previously applied *McDonnell Douglas* to non-employment discrimination cases. *See, e.g., Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991) (application for automobile dealership); *Secretary, United States Dep't Hous. & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (case brought under federal Fair Housing Act). Thus, even if the Eleventh Circuit had held otherwise in this case, there still would be no conflict between the Eleventh Circuit and the circuits that issued the six decisions cited by plaintiffs as the earlier Eleventh Circuit decisions would remain controlling in the circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir.) ("[W]here two prior panel decisions conflict we are bound to follow the oldest one"), *cert. denied*, 121 S. Ct. 381 (2000).

at 15a-16a)[14] The significance of this statement lies only in its recognition that plaintiffs' burden to show discriminatory intent will necessitate individualized inquiry, thereby precluding a finding that common issues predominate as required by Rule 23(b)(3). *See Burdine*, 450 U.S. at 253. Whether this showing is made as part of plaintiffs' prima facie case or at another stage in the proceeding is beside the point. Either way, the ultimate factual issue to be decided on a case-by-case basis is whether each challenged conduct was motivated by discriminatory intent. *See United Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (once plaintiff establishes prima facie case, *McDonnell Douglas* presumption "drops from the case" and ultimate factual issue for court is whether defendant intentionally discriminated against plaintiff); *Stewart v. Adolph Co.*, 217 F.3d 1285, 1287 (10th Cir. 2000) ("On the merits, the burden shifting framework of *McDonnell Douglas* is largely irrelevant and the issue is whether the adverse employment action was motivated by race."), cert. denied, 121 S.Ct. 774 (2001); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984) (noting that *McDonnell Douglas* formula "does not compartmentalize the evidence so as to limit its use to only one phase of the case").

Accordingly, the decision below does not conflict with *McDonnell Douglas*, and does not warrant review by this Court.

---

[14] The term "prima facie case" has two meanings. It could mean the establishment of a rebuttable presumption pursuant to *McDonnell Douglas*, and it could also be used to describe the plaintiff's burden of producing enough evidence to go to a jury. *See Burdine*, 450 U.S. at 254 n.7.

CONCLUSION

For the foregoing reasons, Avis respectfully submits that the petition for certiorari be denied.

Respectfully submitted,

Jonathan J. Lerner
Counsel of Record
Angela G. Garcia
Jacob E. Hollinger
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Robert T. Wright, Jr.
Verner, Liipfert, Bernhard,
McPherson & Hand
3100 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
(305) 371-8801

February 8, 2001